

Staff Summary Report



Hearing Officer Hearing Date: December 16, 2008

Agenda Item Number: 2

SUBJECT: This is a public hearing for a request for revocation of the use permit issued to H B PLACE TOBACCO (PL060676) to allow a tobacco retailer.

DOCUMENT NAME: 20081216dssd01

PLANNED DEVELOPMENT (0406)

SUPPORTING DOCS: Yes

COMMENTS: Hold a public hearing for a review of the following for possible revocation of the use permit per the City of Tempe Attorney office's direction due to non-compliance with the Condition of Approval No. 8, which reads, "Smoking will not be permitted within this establishment."

Request by WALGREENS PLAZA – HB PLACE TOBACCO (PL060676) (Anis Ben Harzallah, applicant; Commercial Properties LLC, property owner) located at 53 East Broadway Road in the CSS, Commercial Shopping and Services District for:

ZUP06088 Use permit to allow a tobacco retailer.
(Use permit was approved by the Hearing Officer at the December 19, 2006 HO hearing.)

PREPARED BY: Shawn Daffara, Planner II (480-858-2284)

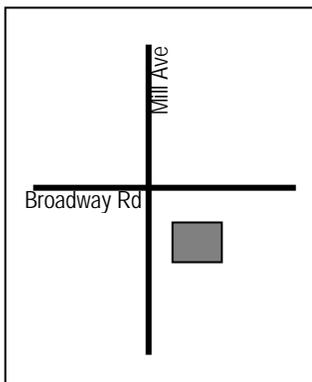
REVIEWED BY: Steve Abrahamson, Planning & Zoning Coordinator (480-350-8359) *SEA*

LEGAL REVIEW BY: N/A

FISCAL NOTE: N/A

RECOMMENDATION: Staff – Approval of Revocation

ADDITIONAL INFO: The City of Tempe is requesting a review of the HB Place Tobacco (ZUP06088) for possible revocation of the use permit. HB Place Tobacco has been in violation of the use permit, non-compliance with the conditions of approval. Condition of approval No. 8: "Smoking will not be permitted within this establishment."



PAGES:

1. List of Attachments
2. Comments;
3. Original Conditions of Approval; Reasons for Approval;
4. History & Facts; Description; Zoning & Development Code Reference

ATTACHMENTS:

1. Location Map
2. Aerial Photo
- 3-4. Letter of Intent, dated 11/30/06
- 5-6. City of Tempe Letter of Approval, dated 12/27/06
7. Correction Notice, September 19, 2008
8. Administrative Hearing Request, September 25, 2008
9. City Council Decision Letter, October 20, 2008
10. Final Correction Notice, October 24, 2008
- 11-12. Superior Court Decision, November 19, 2008
13. Site plan
14. Floor Plan
15. Staff Photograph(s)

COMMENTS:

The City of Tempe is requesting a review of the HB Place Tobacco (ZUP06088) for possible revocation of the use permit. HB Place Tobacco has been in violation of the use permit, non-compliance with the conditions of approval. Condition of approval No. 8: "Smoking will not be permitted within this establishment."

The Hearing Officer approved a use permit for a Tobacco Retailer, to allow sales of coffee, hot and cold beverages, cigars, cigarettes, chewing tobacco, cigarette tobacco, pipe tobacco, pipes, hookahs, water pipes for tobacco use only, lighters and other tobacco-related products. Due to neighborhood input, the Hearing Officer added a condition of approval No. 8; Smoking shall not be permitted within the establishment. Soon after HB Place opened for business, our Commercial Code Compliance Division received a complaint about HB Place operating a hookah lounge. A Hookah Lounge would be in violation of condition of approval No. 8, therefore a correction notice was issued on March 11, 2008.

To resolve the correction notice, the owner of HB Place, Mr. Ben Harzallah applied for a new use permit to operate a hookah lounge. The Hearing Officer approved a use permit to allow a Tobacco Retailer and Hookah lounge on May 20, 2008. Neighbors from Date Palm Manor neighborhood filed an appeal of the use permit that ultimately went before the City Council. On September 11, 2008 the City Council approved the neighborhood's appeal, thus denying the HB Place Hookah Lounge use permit.

Planning and Code Compliance staff inspected HB Place on September 19, 2008 and found HB Place was continuing to operate a Hookah Lounge which is in non-compliance with the original use permit (ZUP06088) condition of approval No. 8. Code Compliance issued a correction notice to cease all smoking activity inside the premises or face a revocation of the 2006 use permit. Staff held an administrative review of the Tobacco Retailer use permit on September 26, 2008. Mr. Harzallah and his attorney Mr. Peter Spiess met with Planning and Code Compliance staff regarding the denial of the Hookah Lounge use permit and violation of the 2006 use permit conditions of approval. Mr. Spiess told city staff that his client Mr. Harzallah would be appealing the City Council decision to deny the hookah lounge use permit to Maricopa County Superior Court. The appeal went before the Maricopa County Superior Court which rendered a decision on November 19, 2008. Courts ruled the preliminary injunction is denied.

On October 24, 2008, Planning and Code Compliance staff conducted a final inspection and found HB place was still operating a hookah lounge which is still in violation of the original use permit condition of approval # 8. Correction Notice was given to Mr. Harzallah with a revocation hearing scheduled for December 16, 2008.

Use Permit

The Zoning and Development Code requires a Tobacco Retailer to obtain a use permit in the CSS, Commercial Shopping and Services District. When the use permit was approved it met applicable tests in the following manner:

Evaluating the use permit, the proposal appears to pass the use permit test listed below:

- a. Any significant increase in vehicular or pedestrian traffic in adjacent areas;
 - There will be no significant increase in vehicular or pedestrian traffic in adjacent areas.
- b. Nuisance arising from the emission of odor, dust, gas, noise, vibration, smoke, heat, or glare at a level exceeding that of ambient conditions;
 - This is a retail use, similar to others within the shopping center; there should be no nuisances.
- c. Contribution to the deterioration of the neighborhood or to the downgrading of property values which is in conflict with the goals, objectives or policies for rehabilitation, redevelopment or conservation as set forth in the City's adopted plans, or General Plan;

- The proposed development would not contribute to neighborhood deterioration or downgrade property values. This use permit request is consistent with the General Plan 2030's Land Use Element. The requested use permit will not be detrimental to the surrounding area, but will further the General Plan Land Use Element Goals and Strategies.
- d. Compatibility with existing surrounding structures and uses;
 - The proposed use appears to be compatible with surrounding uses.

**ORIGINAL
CONDITION(S)
OF APPROVAL (ZUP06088):**

1. All permits and clearances required by the Building Safety Division shall be obtained prior to the use permit becoming effective.
2. The use permit is transferable. Should the business be sold, the new owners must reprocess for administrative review.
3. The use permit is valid for the plans and business operation as submitted to and approved by the Hearing Officer/Board of Adjustment.
4. If there are any complaints arising from the use permit that are verified by a consensus of the complaining party and the City Attorney's office, the use permit will be reviewed by city staff to determine the need for a public hearing to re-evaluate the appropriateness of the use permit.
5. The applicant shall devise a security plan in conjunction with the Police Department officials (contact Officer William Vanek (480) 858-6342) prior to the use permit becoming effective.
6. All business signs shall be Development Review staff approved and permits obtained.
7. The applicant shall contact and work with Development Services Development Review staff to upgrade non-compliant lighting at the proposed suite. Further, a 6" x 6" lexan or laminated glass vision panel shall be centered and installed at 63" above finished grade in the east elevation man door. These upgrades shall provide for the safety, security and code compliancy of the proposed business.
8. Smoking will not be permitted within this establishment. **ADDED BY HEARING OFFICER**

Conclusion

Staff recommends approval of the revocation of the use permit.

**REASON(S) FOR
APPROVAL:**

1. Non-compliance with the conditions of approval. Zoning and Development Code, Section 6-603 allows for a review and possible revocation of use permits, if conditions of approval are not met.

SHOULD THE HEARING OFFICER ELECT TO TAKE AFFIRMATIVE ACTION ON THE REQUEST, THE USE PERMIT WOULD BE REVOKED.

HISTORY & FACTS:

- December 19, 2006 ZUP06088: Hearing Officer approved a use permit to allow a Tobacco Retailer for HB PLACE.
- March 11, 2008 CM080349: Complaint opened on HB PLACE for violation of conditions of approval. "Smoking will not be permitted inside this establishment."
- April 10, 2008 DSM08019: Zoning Administrators Decision to allow HB PLACE hookah lounge to apply for a use permit given they did not meet the 1,320 foot separation from a school.
- May 20, 2008 ZUP08068: Hearing Officer approved a Use Permit for HB PLACE to allow a Tobacco Retailer/Hookah Lounge.
- July 8, 2008 UPA08003: The Development Review Commission denied the appeal for HB PLACE Tobacco Retailer/Hookah Lounge thus upholding the Hearing Officer's approval.
- September 11, 2008 UPA08005: The City Council approved the appeal for HB PLACE Tobacco Retailer/Hookah Lounge thus denying the use permit.
- September 19, 2008 Planning and Code Compliance staff conducted an inspection at HB Place. HB Place was found to be in violation of use permit (ZUP06088) condition of approval # 8: "Smoking will not be permitted within this establishment."
- September 26, 2008 Mr. Ben Harzallah and his attorney Peter Spiess attended an administrative hearing to discuss non-compliance with the Conditions of Approval.
- October 24, 2008 Planning and Code Compliance staff conducted an inspection at HB Place. HB Place was found to be in violation of use permit (ZUP06088) condition of approval # 8: "Smoking will not be permitted within this establishment."

DESCRIPTION:

Owner – Anis Ben Harzallah
Applicant – Jeff Tamulevich/City of Tempe – Commercial Code Compliance
Existing Zoning – CSS, Commercial Shopping & Services District
Parcel Size – 114,301 s.f. / 2.62 acres
Total Building Area – 40,202 s.f.
Tenant Area – 2,117 s.f.
Parking Required – 8 spaces
Parking Provided – 152 spaces

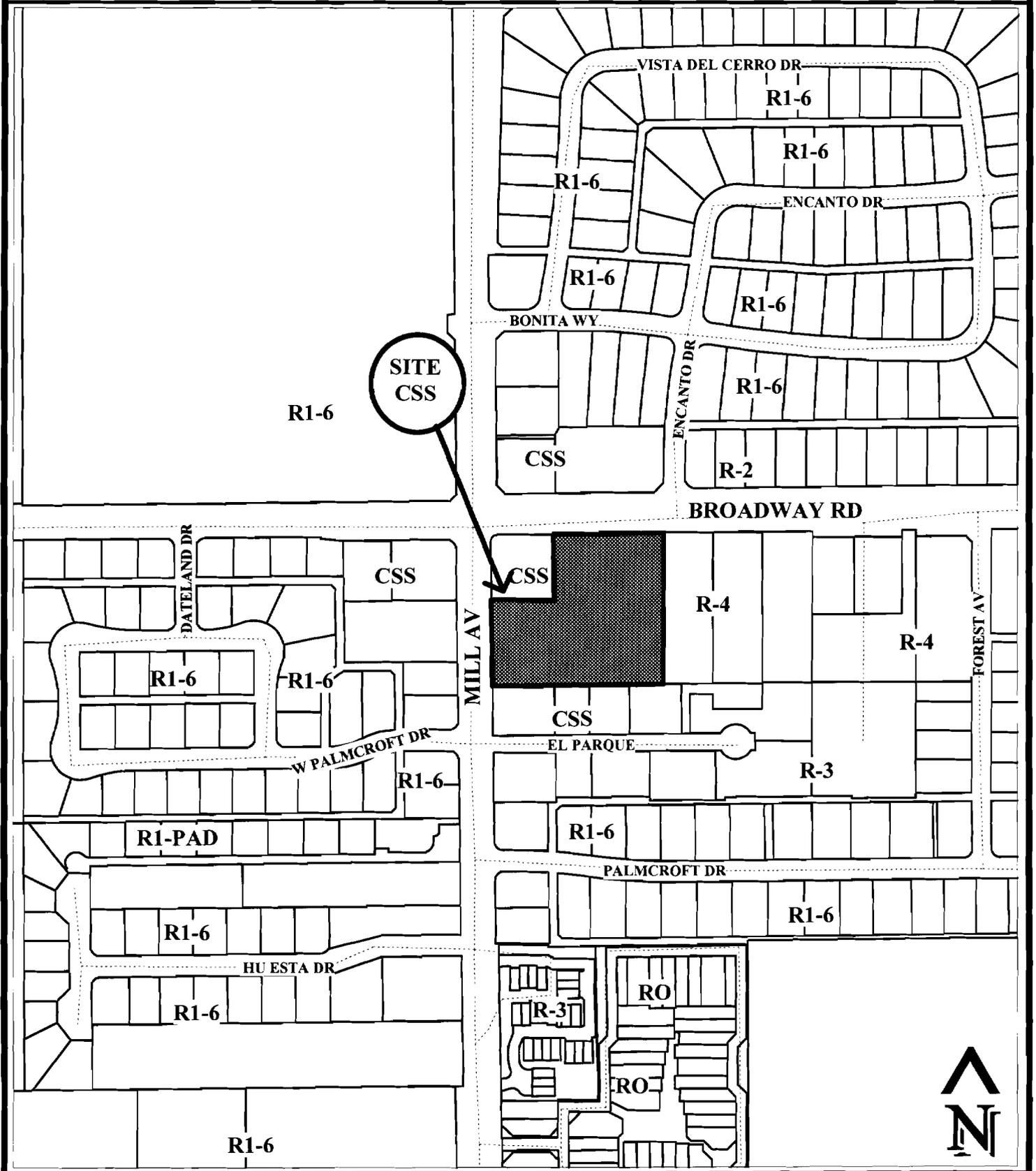
ZONING AND DEVELOPMENT

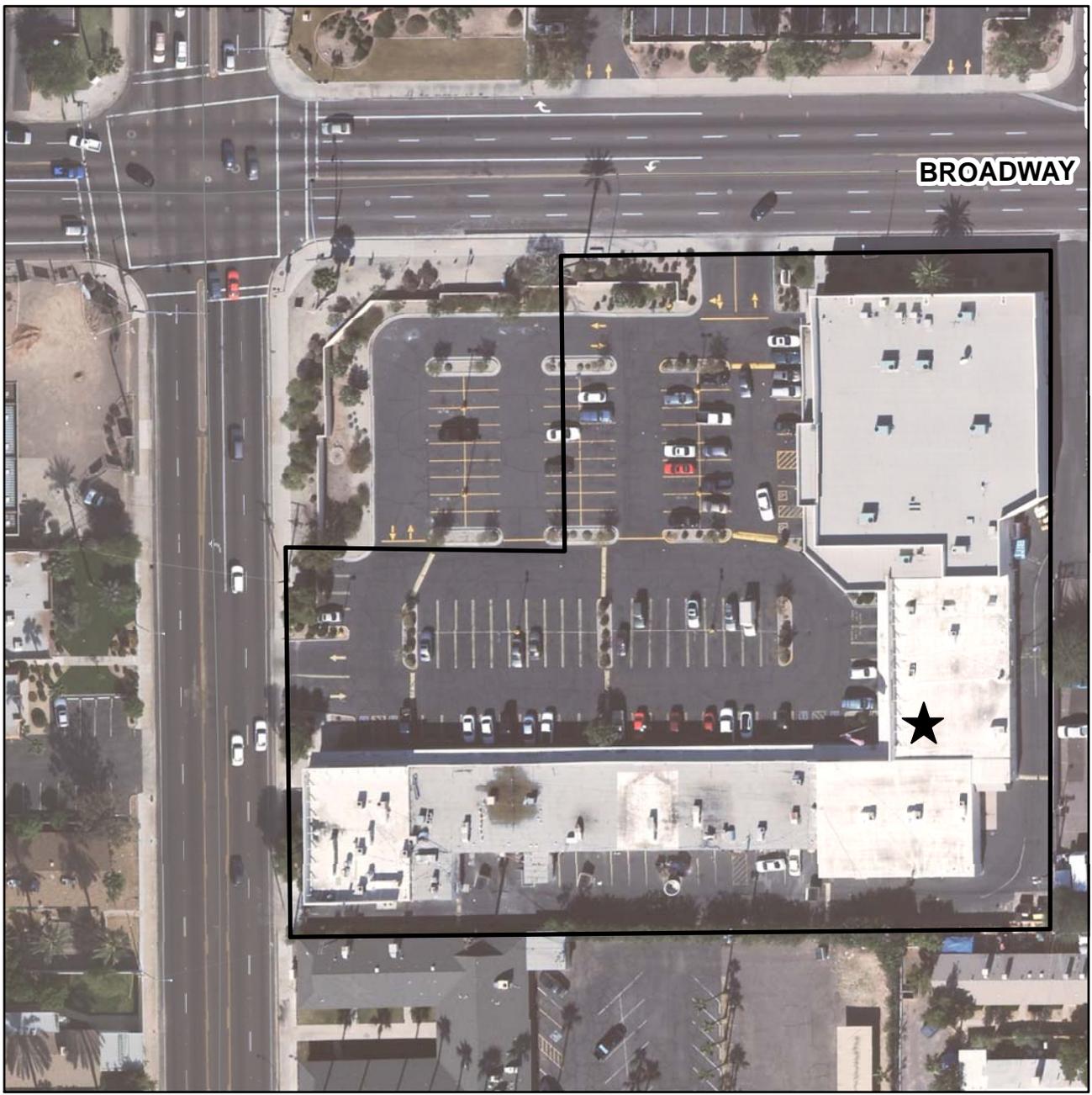
CODE REFERENCE:

- Part 6, Chapter 3, Section 6-308: Use Permit
- Part 6, Chapter 6, Section 6-603: Time Limits on Conditions
- Part 3, Chapter 4, Section 3-423: Use Separation Requirements

WALGREENS PLAZA-HB TOBACCO

PL060676





WALGREEN'S PLAZA - HB TOBACCO (PL060676)

ANIS BEN HARZALLAH
851 W. University Drive
Tempe, AZ 85281
Tel. (480) 921-2528

RECEIVED
06 NOV 30 AM 11:45
TEMPE-DEVELOPMENT
SERVICES DEPARTMENT

November 30, 2006

City of Tempe
Development Services
31 East Fifth St.
Tempe, AZ 85280

Re: Use Permit Request
Parcel No. 133-23-021A [Walgreens Plaza] – 53 E. Broadway
Name of Business: HB Place Tobacco

Gentlemen:

I plan to open a business named HB Place Tobacco in a 2,117 s.f. space on the above parcel at 53 E. Broadway. My business will involve the sale of coffee, hot and cold beverages, cigars, cigarettes, chewing tobacco, cigarette tobacco, pipe tobacco, pipes, hookahs, water pipes for tobacco use only and lighters. Under no circumstances will I be operating a head shop.

I will be the sole operator of the business and at this time I do not intend to have any employees. The hours of operation will be 12:00 P.M. to 12:00 A.M. Sunday through Saturday.

At this time, I do not know the number of customers who will be entering my business every day and I can only estimate that I will have an average of 50 to 75 customers per day.

However, my business will not cause any significant change to the vehicular or pedestrian traffic in and around the Walgreens Plaza center, Broadway Road, Mill Avenue or the surrounding streets.

My business will not cause any nuisance exceeding that of the ambient conditions and will not contribute to the deterioration of the neighborhood or be in conflict with the goals, objectives and policies of the City of Tempe.

I am also working with the Tempe City Police to devise a security plan for my business which is acceptable with the police department.

My business will also occupy an existing suite in the Walgreen's Plaza Center and therefore there should not be any construction issues.

In addition to proceeding with the approvals granted, it is understood that any and all conditions as stipulated by the Hearing Officer as indicated above, shall be fully complied with.

If the action of the Hearing Officer was required for the purposes of rectifying any violations of the Zoning and Development Code, the violations shall be the responsibility of the applicant/owner to fully correct and achieve conformance.

In sign-related violations, corrections shall be made within five (5) days of Hearing Officer action; in all other matters, corrections shall be made within fifteen (15) days of Hearing Officer action, unless specifically conditioned otherwise by the Hearing Officer.

You are further advised that the above does not waive the requirements for obtaining building permits and other clearances as may be necessary.

Sincerely,

A handwritten signature in black ink that reads "Steve A. Abrahamson". The signature is written in a cursive, slightly slanted style.

Steve Abrahamson
Senior Planner

SA:dm

cc: Mr. Craig Lessler/Lessler Commercial Properties LLC
Mr. Stanford Stoneman/Stoneman Properties
File

(480) 350-8331 (Phone)

December 27, 2006

Mr. Anis Ben Harzallah
851 West University Drive
Tempe, Arizona 85281

**RE: HB PLACE TOBACCO
PL060676 / ZUP06088**

Dear Mr. Harzallah:

You are hereby advised that at the hearing held December 19, 2006, the Hearing Officer of the City of Tempe, acting in accordance with Section 1-305, Paragraphs C and D, of the Zoning and Development Code:

Approved the request by **WALGREENS PLAZA – HB PLACE TOBACCO (PL060676)** (Anis Ben Harzallah, applicant; Commercial Properties LLC, property owner) located at 53 East Broadway Road in the CSS, Commercial Shopping and Services District for:

ZUP06088 Use permit to allow a tobacco retailer.

Subject to the following conditions of approval:

1. All permits and clearances required by the Building Safety Division shall be obtained prior to the use permit becoming effective.
2. The use permit is transferable. Should the business be sold, the new owners must reprocess for administrative review.
3. The use permit is valid for the plans and business operation as submitted to and approved by the Hearing Officer/Board of Adjustment.
4. If there are any complaints arising from the use permit that are verified by a consensus of the complaining party and the City Attorney's office, the use permit will be reviewed by city staff to determine the need for a public hearing to re-evaluate the appropriateness of the use permit.
5. The applicant shall devise a security plan in conjunction with the Police Department officials (contact Officer William Vanek (480) 858-6342) prior to the use permit becoming effective.
6. All business signs shall be Development Review staff approved and permits obtained.
7. The applicant shall contact and work with Development Services Development Review staff to upgrade non-compliant lighting at the proposed suite. Further, a 6" x 6" lexan or laminated glass vision panel shall be centered and installed at 63" above finished grade in the east elevation man door. These upgrades shall provide for the safety, security and code compliancy of the proposed business.
8. **Smoking will not be permitted within this establishment. ADDED BY HEARING OFFICER**

Approvals are specifically conditioned upon the applicant proceeding with the proposed use(s) and/or variance(s) within twelve (12) months of the date of the approval by the Hearing Officer and required by the Zoning and Development Code.

Lastly, my business will not result in any disruptive behavior which may create a nuisance to the area surrounding the Walgreen's Plaza Center or the general public.

Very truly yours,

Anis Ben Harzallah

A handwritten signature in black ink, appearing to read "Anis Ben Harzallah", with a horizontal line underneath.

City of Tempe



Development Services Department - Commercial Code Compliance

Correction Notice

Business HB Place

Address 53 E. Broadway Rd.

This site has been inspected and violation(s) have been identified.
Please correct as noted below

NOTE: Your business is in violation of the City of Tempe Zoning and Development Code section 6.308(I), Condition #8 from your Use Permit approval dated December 19, 2006 stated "smoking will not be permitted within this establishment". Please discontinue the smoking activity immediately. Failure to comply may result in the revocation of your Use Permit. City staff will contact you and provide you with the date and time of your administrative hearing.

By JEFF TANULEVICH Phone # 480.350.8441
Date 9.19.8

September 25, 2008

Mr. Anis Ben Harzallah
851 West University Drive
Tempe, AZ 85281

**RE: HB PLACE TOBACCO - Use Permit
53 East Broadway Road
PL060676/DS061478/ZUP06088**

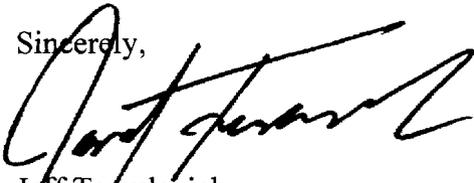
Dear Mr. Harzallah:

We are requesting your presence at an administrative hearing to discuss the conditions of approval for your Use Permit for HB Place Tobacco at 53 East Broadway Road (ZUP06088). Condition number eight (8) of the approval letter dated December 27, 2006 stated that "Smoking will not be permitted within this establishment". Our records indicate that this condition has not been complied with.

Please be advised that the City of Tempe Zoning and Development Code Part 6, Chapter 9, Section 6-902 states that if the applicant has not taken corrective actions to resolve the issues related to the approval, then the original decision making body may revoke the use permit. We have scheduled the hearing for Friday, September 26, 2008 at 9:30 AM in the City of Tempe Development Services Department Conference Room located at 31 E. 5th Street, Tempe. Staff recommends that you be in attendance for the hearing to provide any relevant information and/or plans for possible corrective actions that may be taken to avoid the revocation of your Use Permit.

Should you have questions concerning this notice, please contact me directly at (480) 350-8441.

Sincerely,



Jeff Tamulevich
Commercial Code Compliance Administrator
Development Services Department
480-350-8441

Copy: File

City of Tempe
P.O. Box 5002
31 East Fifth Street
Tempe, AZ 85280
480-350-8872 (FAX)



Development Services
Department
(480) 350-8331 (Phone)

October 20, 2008

Mr. Anis Ben Harzallah
HB Place Tobacco
53 East Broadway Road
Tempe, Arizona 85282

**RE: H B TOBACCO - REQUEST FOR RECONSIDERATION
APPEAL BY DATE PALM MANOR NEIGHBORHOOD ASSOCIATION
PL060676 / ZUP08068 / UPA08005**

Dear Mr. Harzallah:

Your request for reconsideration of the following decision has been received:
On September 11, 2008, the City Council approved the appeal by the Date Palm Manor Neighborhood Association (**UPA08005**) of the July 8, 2008 Development Review Commission decision to uphold the May 20, 2008 Hearing Officer's approval of the request by **WALGREENS PLAZA - H B TOBACCO (PL060676)** (Steve Stewart, Date Palm Manor, applicant; Anis Ben Harzallah, business owner; Mark Stoneman/Stoneman Properties, property owner) located at 53 East Broadway Road in the CSS, Commercial Shopping and Services District for a use permit to allow a hookah lounge/tobacco retailer. This decision denied the use permit previously approved by the Hearing Officer on May 20, 2008.

On **November 6, 2008** in the Council Chambers at 31 East Fifth Street at 7:30 PM the City Council will consider a motion as to whether this request for reconsideration will be heard. Should this motion pass, your request for reconsideration will be heard at that time.

If you have any questions, please contact me at (480) 350-8989.

Sincerely,

A handwritten signature in black ink that reads 'Lisa Collins'.

Lisa Collins
Planning Director

LC/dm

cc: G. Peter Spiess/Spiess & Associates PC
Larry S. Lazarus & Benjamin W. Graff/Lazarus & Associates, P.C.
Mr. Steve Stewart/Date Palm Manor Neighborhood Association.
Mr. Mark Stoneman/Stoneman Properties
Jeff Tamulevich/COT – Commercial Code Compliance
E-Mailed to: Anis_HA90004@hotmail.com
E-Mailed to: Ferrin@doitnow.com
File

City of Tempe



Development Services Department - Commercial Code Compliance

Correction Notice

Business HB PLACE
Address 53 E BROADWAY RD.

This site has been inspected and violation(s) have been identified.
Please correct as noted below

NOTE: YOUR BUSINESS IS IN VIOLATION OF
THE CITY OF TEMPE ZONING & DEVELOPMENT
CODE SECTION 6-300(I), CONDITION NUMBER
EIGHT (8) FROM YOUR USE PERMIT APPROVAL
DATED DECEMBER 19, 2006 STATED "SMOKING
WILL NOT BE PERMITTED WITHIN THIS ESTABLISH-
MENT". THE SMOKING ACTIVITY HAS CONTINUED
AND THEREFORE A REVOCATION HEARING HAS BEEN
SCHEDULED AT THE HEARING OFFICER ON
NOVEMBER 18, 2008 AT 1:30 PM.

By JEFF TAMULEVICH Phone # 480.390.8441
Date 10.24.08

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-025164

11/19/2008

HONORABLE JOHN A. BUTTRICK

CLERK OF THE COURT
C. Castro
Deputy

ANIS BEN HARZALLA

G PETER SPIESS

v.

CITY OF TEMPE

DAVID M PARK

RULING

Plaintiff Anis Ben Harzalla, dba HB Place Tobacco (“Harzalla”) moved for a preliminary injunction prohibiting the Defendant City of Tempe (“Tempe”) from proceeding with ongoing enforcement efforts concerning Harzalla’s alleged violations of his use permit issued by Tempe on December 19, 2006.

A hearing on Harzalla’s request for injunctive relief was held on November 13, 2008. The matter was taken under advisement at that time. The Court has now reviewed the evidence presented, the admitted exhibits and the submissions of counsel.

In order to prevail on his request for preliminary injunctive relief, Harzalla must demonstrate, inter alia, a strong likelihood of success on the merits. *LaFaro v. Cahill*, 203 Ariz. 482 (App. 2002).

Harzalla attacks both the December 19, 2006 use permit condition 8 and the Tempe City Council’s action of September 11, 2008 in granting the appeal from actions taken at the July 8, 2008 meeting of the Development Review Commission.

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2008-025164

11/19/2008

As to the December 19, 2006 use permit, Harzalla's failure to timely appeal that issuance (and, indeed, his acquiescence and active encouragement in its "no smoking" condition) makes it unlikely that he would prevail in his attack on it.¹

Harzalla's complaint about the City Council's action is twofold. First, he asserts that the Council did not "consider" certain criteria mandated by Zoning Code §6-308(E). But, in fact, the Council did hear testimony concerning the relevant criteria and Harzalla's own lawyer expressly drew the Council's attention to those criteria. See Exhibit 1, tab 4, p.10-11.

Second, Harzalla argues that the Council ran afoul of the "uniformity" requirement of Ariz. Rev. Stat. §9-462.01(c) as explicated by *Jachimek v. Superior Court*, 169 Ariz. 317 (1991). There the Court invalidated a City's attempt by ordinance to create an overlay zone which, in effect, required a use permit for uses that were permitted without such a permit in other areas with the same zoning. But Harzalla's argument ignores that in this case all tobacco retailers are subject to the same permit requirements. In reality Harzalla is questioning the wisdom of the City Council's unanimous decision against him. This Court is unlikely to accept Harzalla's invitation to second guess the Council's exercise of its discretion.

Since Harzalla has not shown a strong likelihood of success on the merits, he is not entitled to Rule 65 relief. Therefore,

The Application for Preliminary Injunction is denied.

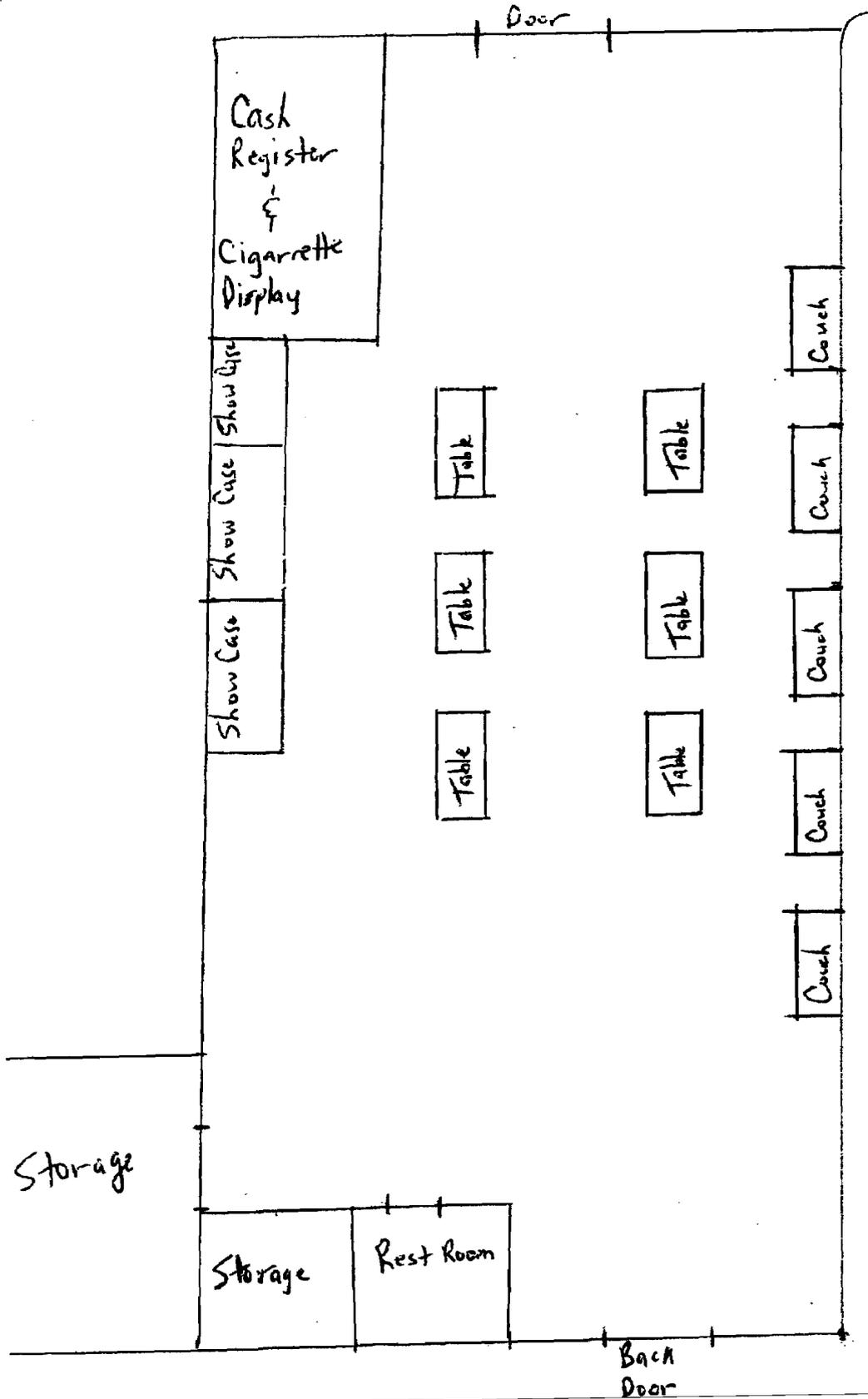
FILED: Exhibit Worksheet

/ s / HON. JOHN A. BUTTRICK

JUDICIAL OFFICER OF THE SUPERIOR COURT

¹ It should be noted that at the December 19, 2006 hearing, Harzalla's attorney expressly informed the hearing officer that there would be "no smoking inside the shop." See Exhibit 1, tab 1, p.2.

HB. Place Tobacco
53 E. Broadway





WALGREENS PLAZA- HB TOBACCO

53 EAST BROADWAY ROAD

PL060676

FRONT OF BUSINESS